DOCUMENT RESUME

ED 473 479 CS 511 765

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TITLE	Balancing Free Speech and Government Protection in a Time of Threat.
PUB DATE	2002-11-22
NOTE	18p.; Paper presented at the Annual Meeting of the National Communication Association (88th, New Orleans, LA, November 21-24, 2002).
PUB TYPE	Information Analyses (070) -- Opinion Papers (120) -- Speeches/Meeting Papers (150)
EDRS PRICE	EDRS Price MF01/PC01 Plus Postage.
DESCRIPTORS	*Civil Liberties; *Freedom of Speech; *Government Role; Higher Education; National Security
IDENTIFIERS	*First Amendment; Government Regulation; Historical Background; Hutchins Commission Report; Information Age; Press Responsibility; *September 11 Terrorist Attacks 2001

ABSTRACT

A common misconception among first-year university students is that the United States provides unabridged, uncensored absolute free speech rights. Evidently these assumptions are derived from popular press and entertainment industry images which place heavy emphasis on one end of the debate. It is a shock for some students to be exposed to the other side of the debate, i.e., the reality that there are some restrictions on free speech which exist, in part, for the protection of the individual. This paper first provides a historical context for free speech and government restrictions, citing court pronouncements on the issue. The paper discusses the results of the State of the First Amendment survey, taken after September 11, 2001, describing a pendulum shift in the wake of the attack on the United States. Forty-nine percent (49%) said the First Amendment goes too far in the rights it grants, a 10% jump from the previous year. It considers 1947's Hutchins Commission, which proposed guidelines related to press responsibility to be used to address the balancing question faced by decision-makers of that generation. It focuses on one post-9/11 free expression advocate, OMB Watch, an organization concerned about the government going too far in restricting access to documents in the wake of 9/11. The paper notes that the Information Age presents challenges not previously encountered in the way information is disseminated in times of war and national crisis. It finds that two mutually exclusive goals, the right of the people to know, and the obligation of the government to protect its citizens in time of war, cannot both be satisfied in their entirety. (Contains 18 references.) (NKA)

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Balancing Free Speech and Government Protection in a Time of Threat

ED 473 479

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Paper Presented November 22, 2002

National Communication Association Convention

New Orleans, Louisiana

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There has always been a goal of seeking a balance between free expression and government control in the United States even before the founding of the country. The pendulum has swung from various ends of the center depending upon various factors which will be discussed in this paper. Historically this contextually understanding provides some insight into the debate as it is now finds positioning in an early 21st century framework.

One of the common misconceptions among first year university students is that the United States provides unabridged, uncensored absolute free speech rights. Frequently they will argue relentlessly for this nonexistent right based on assumptions, inferences, and clichés. Evidently these assumptions are derived from images in the popular press and entertainment industries which place heavy emphasis on one end of the debate. It comes as quite a shock for some students to be exposed to the other side of the debate, i.e., the reality that there are some restrictions on free speech and they exist, in part for the protection of the individual.

Historical Contexts

The government, as expressed through court decisions, isn't the only fluctuating party in the balancing of free speech and government restrictions. Individuals throughout the history of the country have found themselves being less than consistent on the issue.

In 1793 Dr. Thomas Cooper found England too restrictive for his contentious, aggressive, expressive spirit. He migrated to America only to find

himself, along with other Jeffersonians sharply circumscribed by the new government through the Alien and Sedition Acts of 1798-1800 (Nelson, 1967). Those acts made it a federal crime to criticize the government. In his publications in the Northumberland, Pennsylvania *Gazette*, Cooper became one of the first to call for radical freedom of expression. Under President John Adams he was convicted of violating the Sedition Act.

Cooper had a change of philosophy in 1835. As a Southerner who favored the exclusion of abolitionist literature, he advocated it be prohibited from being disseminated through the mails (Nelson, 1967).

Louis Brandeis weighed in on the balancing issue in an 1890 *Harvard Law Review* article he coauthored with Samuel D. Warren. In discussing the right of free expression, Brandeis and Warren "argued eloquently for the establishment of civil-damages laws that would protect individuals from invasion of privacy" (Friendly, 1981).

An Unending Balancing Act

Middleton and Chamberlin (1988) describe the challenge of balancing free expression and government regulation by noting "in no other country do people enjoy the freedom of expression exercised by Americans." In the following paragraph they add "despite the categorical prohibition against government interference, the freedom to speak and publish is not absolute."

One of the most basic of those is the protection of personal reputation. Laws prohibiting libel and slander are designed to shield the individual from false

information about their character. Such laws are at the other end of the pendulum from unabridged free expression. Over the years courts have interpreted libel and slander laws in various ways including that all the way from strict constructionist to judicial activist approaches.

The Balancing Act During Times of War and Conflict

Another abridgement of First Amendment rights occurs during wartime. Don Pember (1997) notes "there was censorship in every war in which the United States was involved, beginning with the Civil War. Censorship in both World War I and World War II was extensive." In seeking to determine whether speech is permissible, the courts have considered various factors over the years. In times of war, what would otherwise be permitted is prohibited. These subjective judgments can be found during times of peace also. "So-called 'pure speech' is given more protection than 'speech-plus' consisting of expression accompanied by conduct, such as picketing or staging a sit-in" notes John Watkins (1990). This "*ad hoc balancing* calls upon the court to determine which of the conflicting interests demands greater protection under the particular facts of the case before it" (Watkins, p. 17).

Shortly after the September 11, 2001 attack on the World Trade Center and Pentagon, Congress passed the USA Act, which stands for "Uniting and Strengthening America" (McCullagh, 2002). Passage occurred about a month after the attack. Just hours after the Senate approved the measure, the House added its approval, but with a difference. In the House's version, the wiretap

sections would expire in December 2004 unless the president decided to extend them in the national interest until December 2006 (McCullagh, 2002).

Allegra Chapman of the Atlanta Bureau of *The Internet Law Journal* charges that the act grants the government "unprecedented surveillance powers to, among other things, monitor web-use in an effort to curb terrorism." EFF, the Electronic Frontier Foundation, which describes itself as "the leading civil liberties organization working to protect rights in the digital world" harshly criticized the bill. Their web page sought to convey the "chilling effect that responses to the terrorist attacks . . . have had on information availability on the Internet as well as some sense of the effect on people trying to provide this information."

The O'Brien Test

In the late 1960s during the height of the protests over the Vietnam Conflict, the Supreme Court was asked to decide a case involving the balancing between free speech and regulations of the Selective Service System. Federal District Court in Massachusetts had upheld the conviction of David Paul O'Brien and three companions who burned their Selective Service registration certificates on the steps of the South Boston Courthouse in protest of the war.

O'Brien argued that the Selective Service System prohibition against destroying or mutilating certificates was unconstitutional because it abridged free speech and served no legitimate purpose. The District Court rejected these arguments and its decision was upheld on appeal by the Supreme Court.

In writing the opinion of the court, Chief Justice Earl Warren established what subsequently became known as the "O'Brien test." It consisted of four parts. Warren wrote, "we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

These four prongs of the O'Brien test provided something of a guideline for determining where the balance should fall in cases between government regulation and free expression of the individual. The realization was that the government curtailed expression, but only as the justification was met and not in an arbitrary and capricious way.

Public Opinion on the Media Following 9-11

Public opinion polls, being snapshots of a fickle population fluctuate widely on matters of the ongoing balancing act. An example can be found in a survey taken after the attack on the U.S. It contrasts significantly with the results of a similar poll taken a year before the incident.

Not surprisingly, the result of the first annual State of the First Amendment survey taken after September 11, 2001 indicated the American public had a pendulum shift in the wake of the attack on the U.S. Nearly half, 49% said the First Amendment goes too far in the rights it grants -- a 10

percentage point jump from 2001. Nearly half also said the American press has been too aggressive in asking government officials for information about the war on terrorism ("New 'State of the).

Ken Paulson, executive director of the First Amendment Center said, "the results of our 2002 survey suggest that many Americans view these fundamental freedoms as possible obstacles in the war on terrorism."

Lefever (1974) observes, "a free and democratic society cannot long endure unless its citizens can participate effectively in the decisions which shape their future." More poignant to the discussion of this paper, he adds, "no decisions are more important than those that bear on the defense, security, and survival of the country and its cherished institutions" So participation requires information, but too much openness in information can result in lost lives in times of international conflict and war. Therefore the myriad choices about the proper balance between disclosure and reticence remains gray, clouded, perplexing.

Lefever goes on to say "the American people can choose and guide their leaders wisely only when the great public issues are clearly defined and freely debated. And this can happen only when the media of mass communication recognize 'the right of the public to be informed.'" The theory is easy to espouse and defend, the application of it during times of national crises is more difficult to experience.

The Hutchins Commission

Just as the O'Brien test provides some historical context to view the balancing question, a study conducted in the late 1940s provides an additional framework for analysis. It was conducted when the nation still had the images of World War II freshly imprinted on its collective mind. Post World War II was a peacetime in that America and its allies had won the war, but the Cold War remained.

Sterling and Kittross (1990) describe what it was like in the country at the time:

> The United States was also caught in international transition from 1945, when we dominated a world at relative peace, to 1952, when we were in a shooting war in Korea and a deepening cold war with the Soviet Union, a newly communist China, and a slowly expanding "third world" of newly independent nations attempting to maneuver between manipulate both sides. The cold war almost reached the flash point in the 1948-1949 Berlin Airlift, by which the Western allies provided all of West Berlin's needs when the Russians cut off ground access. The war in Korea, which started in June 1950, found American troops fighting a major war in Asia, although the world was not plunged into total war and the participants limited the weaponry used.

It was in this context that the Hutchins Commission, in 1947, proposed five guidelines related to press responsibility that were used to address the balancing question faced by decision-makers of that generation. Using the same matrix as a framework for discussing the same issues facing journalists and

regulators in the 21st century will provide some idea whether those recommendations contain any possible help for maintaining a healthy balance between competing issues.

1. The first recommendation of the Commission was that "the constitutional guarantees of the freedom of the press be recognized as including radio and motion pictures" (Gross 1966). Obviously this proposal has been widely accepted since it was first proposed in the late 1940s.

2. The second recommendation is not as easy to gage. The suggestion was that "the government facilitate new ventures in the communications industry" including new technology (Gross). With the FCC's mandate for the conversion of TV licensees to digital technology this portion of the recommendation has come about, but the second portion is more difficult to determine, it encouraged the government to "maintain competition among large units through the antitrust laws, but that those laws be sparingly used to break up such units, and that, where concentration is necessary in communications, the government endeavor to see to it that the public gets the benefit of such concentration" (Gross). Whether this advice has been heeded depends on who answers.

The marketplace model of regulation has dominated the FCC's thinking since the early 1980s, some scholars say even as early as the 70s. Proponents of the marketplace model would say the public is the ultimate decision maker in determining the viability of competing media voices. Consumer groups, academics, and other concerned segments of society would disagree strongly. In the case of reporting during times of crisis, the mega-news operations use

economies of scale to collect and disseminate data to the masses. The moderate and small players have their focus limited to local and regional news.

3. The third recommendation pertains to libel. The remedy was that the injured party be granted a retraction or opportunity to reply. The FCC addressed this issue with the fairness doctrine. Obviously this right is extended to citizens of the country and does not apply to terrorists or their representatives. Since this recommendation was written primarily for domestic debate, it doesn't really apply to a crisis situation involving non-U.S. citizens.

4. Recommendation four concerned "the repeal of legislation prohibiting expressions in favor of revolutionary changes in our institutions where there is no clear and present danger that violence will result from the expressions" (Gross). The Supreme Court has interpreted matters of free expression in this arena more stringently during times of national threat and war than during times of peace. In the case of the September 11 attacks some critics have charged that acts such as the USA Patriot Act are overly restrictive. David Cole, Georgetown law professor was among the critics, saying "this provision in effect resurrects the philosophy of McCarthyism, simply substituting 'terrorist' for 'communist'" (Hudson, 2002).

5. The fifth recommendation sounds somewhat trite and cliché' driven. It calls for the government to "inform the public of the facts with respect to its policies" (Gross). Obviously no government, regardless of how open it is can reveal strategies related to retaliating against terrorists, otherwise the terrorists would be one step ahead of the game. In a broad sense, the public can be made aware of overarching plans.

Balancing Rights in a Post 9-11 Context

Civil libertarians have cast federal authorities as being overzealous in denying fundamental rights to some individuals in the war on terrorism in the wake of the 9-11 attack. One critic called Attorney General John Ashcroft's comments before the annual conference of U.S. attorneys "a bare-knuckled effort to blunt any attempt to question government authority" (Johnson, 2002). At that meeting, Ashcroft urged federal prosecutors to use "every weapon in the criminal justice arsenal" because the security of the country was at risk (Johnson, 2002).

Ashcroft said there were no second chances in the efforts to prevent an second attack from occurring similar to the one on 9-11. Ashcroft was framing the context to that of a war situation. In various dissenting opinions, Oliver Wendell Holmes, Jr. had developed a theme which "sanctioned curbs on free speech during times of war" (Friendly, 1981). Holmes had written, "when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right" (Friendly, 1981).

Ashcroft had receive the endorsement of congressional leaders such as Senator Orrin Hatch of Utah who had testified to the Senate Judiciary Committee on his behalf. Hatch told the committee, "we are at war." He added, "I would hope that, in this time of crisis, we could all check our egos, and for the good of the country, look at the merits of these proposals rather than the manner in which they are packaged" (Hatch, 2001). Hatch's comments were made concerning military

tribunals, but in the broader context, they represent support for the administration's handling of the war on terrorism.

Post 9-11 Free Expression Advocates

OMB Watch is one organization that is concerned about the government going too far in restricting access to documents in the wake of the 9-11 attack. Founded by Gary D. Bass, OMB Watch identifies itself as "a nonprofit and advocacy organization that promotes increased citizen participation" and "greater government accountability" (ombwatch.org).

In an article on their web page, ombwatch.org pointed out that the FBI's National Infrastructure Protection Center (NIPC) discussed terrorism on Internet use in a recent newsletter saying that the Internet has made "arcane and seemingly isolated information quickly and easily retrievable" and that information could be useful for planning attacks on the U.S. infrastructure (ombwatch.org "Right to Know Update"). Ombwatch.org notes, "since September 11, there have been fundamental shifts in public access policies and procedures" (ombwatch.org "Right to Know Update").

Four specific shifts in policy identified by omb.org ("Right to Know Update") are:

1. Vast amounts of information on government web sites have been removed in the wake of 9-11. They list specific examples on their web page.

2. The government is destroying some information completely in the post attacks era. In Arkansas FBI agents visited some libraries to verify that certain documents on CD-ROMs had been destroyed.

3. Laws pertaining to public access are changing in the new restructuring that is occurring at the federal level. The message from Attorney General John Ashcroft is to withhold information from disclosure where possible, with the justification being national security interests.

4. Reading rooms have become more restricted and the procedures for gaining access has been limited. In many agencies "clearance" is now needed before a building can be entered and in some agencies an "escort" is required.

Historical Limitations In the Information Age

The Information Age presents challenges not encountered in the way information was disseminated in previous times of war and national crisis. Moreover, an additional unique variable in the present crisis is the nature of the organization (s) mounting the attacks. Following the three plane high-jackings of 9-11 war was declared on terrorists, not a country. This is a borderless engagement.

The first war American war of the 21st century may be setting the precedents for how war is fought in an era of high tech, where information is a resource in an encounter with an international enemy without borders. No one knows what is or is not acceptable in terms of disclosure of government

documents because no one has faced such an era previously. The rules and expectations are being written day by day as new events unfold.

Advocates of free expression and government officials charged with protecting the citizens of the country are both working within the same political system to maintain a civilization that was attacked by enemies who show no respect for human lives, much less rights of citizens. The limitations of this paper are that the drama is being played out everyday. There are no clear-cut answers, policies, procedures, or norms to follow. Acceptable standards are being revealed as the plot develops.

This paper has largely reported what has taken place up to now and shown how people in previous times of national crisis faced similar dilemmas in their era. No one has a complete handle on how to balance the two ends of the pendulum in way which would be most fair to all parties. That's the complexity that separates "government of the people, by the people, and for the people" from a totalitarian dictatorship.

Two mutually exclusive goals, the right of the people the know and the obligation of the government to protect its citizens in times of war cannot both be satisfied in their entirety. Different competing interests will voice their positions in the marketplace of ideas. Hopefully the voice of reason will be heard and the proper balance will be reached, i.e., the citizens will be protected and the form of government encouraging free expression will remain.

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